Supreme Court, U.S.
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No. 94-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Antonio C. Mastrobuono and Diana G. Mastrobuono,

Petitioners,

v.

Shearson Lehman Hutton Inc., a corporation, Nick DiMinico, Richard F. Benzer, and Mark Stevenson,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the Seventh Circuit correctly interpreted the particular arbitration agreement at issue in this case as precluding the arbitrators from awarding punitive damages?

LIST OF PARTIES

Petitioners:

Antonio C. Mastrobuono

Diana G. Mastrobuono

Respondents:

Lehman Brothers Inc. (Lehman Brothers Inc. is the successor corporation to the corporation that was formerly known as Shearson Lehman Hutton Inc.).

Nick DiMinico

Richard F. Benzer and Mark Stevenson were not appellees in the court below and are not parties herein

The following is furnished in compliance with Supreme Court Rule 29.1:

Lehman Brothers Inc.

Parent Company—Lehman Brothers Holdings Inc.

Subsidiaries (except wholly owned)—None

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REASONS FOR DENYING THE WRIT:	
I.	
PETITIONERS OFFER NO REASON WHY THE COURT SHOULD RECONSIDER ITS VERY RECENT REFUSALS TO REVIEW THE ISSUE INVOLVED IN THIS CASE	1
II.	
THE CASE DOES NOT PRESENT THE FIRST QUESTION STATED BY PETITIONERS	2
III.	
THE DIFFERING RESULTS AMONG THE CIRCUITS TURN ON CONTRACT INTERPRETATION AND DO NOT PRESENT A CONFLICT SUITABLE FOR RESOLUTION BY THIS COURT	3
IV.	
THE SECOND QUESTION PRESENTED IS MERITLESS	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	PAGE
Baravati v. Josephthal, Lyon & Ross, Inc., ___ F.3d ___, 1994 U.S. App. LEXIS 16587 (7th Cir., July 1, 1994)	3, 4
Bonar v. Dean Witter Reynolds Inc., 835 F.2d 1378 (11th Cir. 1988)	4
Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512 (2d Cir.), *cert. denied*, 112 S. Ct. 380 (1991)	2
J. Alexander Securities, Inc. v. Mendez, 17 Cal. App. 4th 1083, 21 Cal. Rptr. 2d 826 (Cal. Ct. App. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2182 (1994)	1
Lee v. Chica, 983 F.2d 883 (8th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 287, 126 L. Ed. 2d 237 (1993)	1, 4
Raytheon v. Automated Bus. Sys., Inc., 882 F.2d 6 (1st Cir. 1989)	4
Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991)	4
Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)	2, 5, 6
Willoughby Roofing & Supply v. Kajima Intern., 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985)	4

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REASONS FOR DENYING THE WRIT

I.

PETITIONERS OFFER NO REASON WHY THE COURT SHOULD RECONSIDER ITS VERY RECENT REFUSALS TO REVIEW THE ISSUE INVOLVED IN THIS CASE

The Court at its last Term twice declined to review cases presenting the question of the power of arbitrators to award punitive damages under arbitration agreements like the one in this case. *Lee v. Chica*, 983 F.2d 883 (8th Cir.), *cert. denied*, ____ U.S. ____, 114 S. Ct. 287, 126 L. Ed. 2d 237 (Oct. 4, 1993); *J. Alexander Securities, Inc. v. Mendez*, 17 Cal. App. 4th 1083, 21 Cal. Rptr. 2d 826 (Cal. Ct. App. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 2182 (June 6, 1994). This case had been decided by the Seventh Circuit at the time the petition for certiorari in the *Mendes* case was before the Court. Indeed, the decision in this case was cited by two dissenting members of the Court. *See* 114 S. Ct. 2182 (Opinion of O'Connor, J., dissenting from the denial of certiorari). Nevertheless, this Court declined review in *Mendes*.

Petitioners do not suggest that there have been any developments since the Court's action last June 6th that make review any more desirable now than it was then. Nor do petitioners suggest any reason why the instant case is a more suitable vehicle for consideration of the issues than was the *Mendes* case. As discussed below, the conflicting results in the lower courts do not reflect significant disparities in their views as to the requirements of the Federal Arbitration Act ("FAA"). Rather, they involve varying interpretations of different contractual language. Moreover, it is doubtful that a decision of this Court could achieve uniformity or eliminate future disputes about how varying forms of arbitration agreements and the rules incorporated therein should be interpreted. Therefore, the petition should be denied.

II.

THE CASE DOES NOT PRESENT THE FIRST QUESTION STATED BY PETITIONERS

In attempting to frame a question calling for review by this Court, petitioners have significantly misstated the holding of the Seventh Circuit. The error invalidates petitioners' arguments for review.

Petitioners describe the Seventh Circuit as holding that the law of a state named in a choice of law provision "rather than the Federal Arbitration Act" governs the arbitrability of a claim for punitive damages. Pet. at i. The Seventh Circuit did not so hold. On the contrary, it expressly acknowledged not only that the FAA governed but that the Act requires that the scope of arbitration agreements be liberally construed and that doubts concerning the scope of arbitrable issues be resolved in favor of arbitrability. 20 F.3d at 716. The court then correctly analyzed the particular arbitration agreement as excluding punitive damages because the parties expressly adopted New York law. The court's deference to what it perceived as the clear meaning of the contract was consistent with—indeed, required by—the principle stated by this Court that the policy of the FAA "is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488 (1989).

The issue as stated by petitioners might be presented where, in contrast to this case, a court relies on diversity jurisdiction, rather than the express agreement of the parties, as the reason for adherence to state law, as was done in *Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir.), *cert. denied*, 112 S. Ct. 380 (1991). But the Seventh Circuit did not follow the rationale of *Fahnestock* or suggest in any way that New York law might apply of its own force absent an agreement of the parties adopting that law.

Indeed, it is simply incorrect to read the Seventh Circuit's opinion as reflecting a predisposition to give state law that is hostile to arbitration priority over the FAA. Moreover, since the decision in this case, the Seventh Circuit has had occasion to revisit the question of arbitrators' power to award punitive damages in cases under the FAA and has expressly rejected the application of state law in the absence of an agreement between the parties expressly adopting state law. In doing so the court stated: "State common law hostile to arbitration is preempted by federal common law friendly to it." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 1994 U.S. App. LEXIS 16587, at *23 (7th Cir., July 1, 1994).

In sum, this case provides no occasion for review by this Court for the purpose, as petitioners' arguments suggest, of correcting "the antiquated jealousy with which the judiciary has traditionally regarded arbitrators and which Congress sought to obviate through enactment of the FAA." *See* Pet. 28-32.

III.

THE DIFFERING RESULTS AMONG THE CIRCUITS TURN ON CONTRACT INTERPRETATION AND DO NOT PRESENT A CONFLICT SUITABLE FOR RESOLUTION BY THIS COURT

The question whether a particular arbitration agreement excludes punitive damages will inevitably depend on the terms of that agreement including, where a choice of law clause is involved, the possible effect of other provisions on the meaning of the choice of law clause. As the Seventh Circuit stated in *Baravati v. Josephthal, supra*:

> The difference between *Mastrobuono* and the contrary decisions is simply a difference over the proper interpretation of the choice of law clause read in light of the parties' agreement to have their disputes arbitrated under rules that allow for the award of punitive damages.

It is therefore clear that there is *no* conflict of legal principle between the decision in *Mastrobouno* and the decisions in the First, Eighth, Ninth and Eleventh circuits said to be in conflict with it. Rather, as the Seventh Circuit explains, the different results of those courts turn on the interpretations of different arbitration agreements.

In each of the Court of Appeals cases cited by petitioners the arbitration agreement included both a choice of law clause and a clause providing for arbitration under the Rules of the American Arbitration Association ("AAA"), which expressly authorize arbitrators to award "any remedy or relief which is just and equitable and within the terms of the agreement of the parties." In each case the court attached significance to the incorporation of the AAA rules as indicating that the parties did not intend by the choice of law clause to preclude an award of punitive damages. *See Raytheon v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 11-12 n.5 (1st Cir. 1989); *Lee v. Chica*, 983 F.2d 883, 888 (8th Cir. 1993); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063 & n.6 (9th Cir. 1991); *Bonar v. Dean Witter Reynolds Inc.*, 835 F.2d 1378, 1387 (11th Cir. 1988); *Willoughby Roofing & Supply v. Kajema Intern.*, 598 F. Supp. 353, 360 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985) (per curiam). Moreover, there appears to be no Court of Appeals case involving adoption of the AAA rules in which a choice of law clause has been held to preclude punitive damages.

In contrast, the arbitration agreement in the present case does not adopt the AAA rules. The rules it does

refer to (New York Stock Exchange, NASD, and American Stock Exchange) do not contain empowering language equivalent to the AAA provision.

Since even minor variations in language will influence the interpretation of agreements, no universal rule as to the effect of choice of law clauses is possible. It is beyond dispute that the parties are free to decide for themselves what powers and procedures, as well as what substantive rules, will govern the arbitration of their disputes. *Volt v. Stanford*, *supra*. This Court could not announce, for example, a universal rule that "choice of law clauses shall not be deemed to apply to remedies," because the terms of contracts inevitably differ and the question in every such contract case will remain, "What did the parties agree to under the particular terms of this arbitration agreement?" Accordingly, review by this Court is unlikely to achieve uniformity in the future course of decisions.

Since this Court cannot act generally as a reviewing court for particular contract interpretations made by lower courts, the problem presented by this case and others involving similar contracts is best left for resolution by the lower courts on a case by case basis. As the Court stated in *Volt*, "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." 489 U.S. at 474, 103 L. Ed. 2d at 497. The present case does not call for an exception. To the contrary, the decision of the Seventh Circuit rests squarely on the authority of *Volt*:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply

does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA. (489 U.S. at 476, 103 L. Ed. 2d at 498.).

IV.

THE SECOND QUESTION PRESENTED IS MERITLESS

Petitioners' second Question Presented appears to be intended to seek review of the Court of Appeals' affirmance of the district court's ruling denying petitioners' request for a trial in the district court to determine punitive damages. *See* Pet. 33. The ruling was plainly correct, both on the ground briefly stated by the Court of Appeals (20 F.3d at 718, Pet. App. 21) and on the additional ground relied on by the district court. Pet. App. 41-43. The Court of Appeals ruled that under the arbitration agreement itself petitioners were entitled only to the damages available in arbitration. The district court had ruled, in addition, that there is no separate cause of action for punitive damages under either New York or Illinois law.

Petitioners argue that the denial of a judicial trial on punitive damages was an improper finding of "waiver." This Court rejected a similar argument in *Volt v. Stanford Univ.*, *supra*. *See* 489 U.S. at 474-75. The argument misconceives the nature of the lower courts' holdings. Petitioners had no "right" to punitive damages; they had only the rights available under the arbitration agreement. Thus, the "waiver" argument adds nothing to petitioners' arguments concerning the correct interpretation of the agreement. Rather, the novel rule suggested by petitioners, that a second substantive hearing be conducted in court to resolve their demand for punitive damages, would eviscerate the central purpose of arbitration—to accomplish the expeditious and efficient resolution of disputes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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